VIJAYALAKSHMI DEVI D/O NADCHATIRAM

v.

DR. MAHADEVAN S/O NADCHATIRAM & 4 ORS.

FEDERAL COURT, KUALA LUMPUR
DATO' ANUAR B. DATO' ZAINAL ABIDIN CJ MALAYA
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH FCJ
TAN SRI DATO' HJ. MOHD AZMI BIN DATO' HJ. KAMARUDDIN FCJ
[CIVIL APPEAL NO. 02-140 OF 1994]
2 AUGUST 1995

COMPANY LAW: *Winding-up proceedings - Trial Judge granting stay of winding-up proceedings under s. 243 of the Companies Act 1965 - Exercise of discretion - Appeal against decision - Whether trial Judge had misdirected himself - Whether trial Judge had failed to consider and apply the correct principles governing stay under s. 243.*

COMPANY LAW: *Winding-up proceedings - Trial Judge granting stay of winding-up proceedings under s. 243 Companies Act 1965 - Delay of 5 $^{1}/_{2}$ years in making the application for stay - Whether material - Whether delay inordinate and a bar to the grant of a stay.*

Nadchatiram Realities (1960) Sdn. Bhd. (the company) was a family company whose shareholders comprised members of the Nadchatiram family. As a result of non-payment of income tax the company was caused to be wound-up on 5 September 1989. On 9 March 1994 the respondents filed a notice of motion seeking stay of the winding-up which application for stay was supported by the liquidator. The appellant opposed the application on several grounds, one of which was that there was a misfeasance summons pending against the 4th. respondent. The learned trial Judge allowed the application and granted the respondents a stay of the winding-up proceedings.

On appeal, the appellant argued that the learned Judge, when exercising his discretion in granting a stay of the winding-up order, had misdirected himself when he failed to consider and apply the correct principles governing a stay under s. 243 of the Companies Act 1965 (the Act). The appellant further argued that from the facts, the learned Judge ought to have found that the respondents had committed inordinate delay in making the application, since, an application for an order for stay must be made promptly.

Held:

Per Mohamed Dzaiddin bin Hj. Abdullah FCJ (delivering the judgment of the Court):
[1] The principles governing the granting of a stay under s. 243 of the Act are that:

1. the granting of a stay under s. 243 of the Act is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.
2. the attitude of the creditors, contributories and the liquidator is a relevant consideration.
3. that in exercising its discretion, the Court will consider not only the interests of the creditors but also whether it is condusive or detrimental to commercial morality and the interests of the public at large.

4. a stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.

[2] Although the concluding part of his written judgment seemed to suggest that the trial Judge had given sufficient consideration to the submissions made on behalf of the appellant, a reading of the judgment resulted in the conclusion that no consideration was given to Counsel's argument opposing the application. It would appear that his Lordship relied entirely on the liquidator's written submission and thus made his finding on the terms recommended by the liquidator.

[3] In the instant case, the appellant is a shareholder and a contributory of the Company, who has interests in the Company upon its winding-up. In the absence of any mention, in the judgment, of the two affidavits filed by the appellant opposing the application to stay the winding-up, the learned Judge had failed to consider the attitude of the appellant which was highly material in deciding how the Court's discretion should be exercised.

[4] It was clear that in granting the stay, the learned Judge accepted the liquidator's submission that the effect of his refusal to grant the stay would deprive the shareholders of their rights to deal with the assets themselves. However, the Court should not only look at the interests of the respondents, but was bound to look at the interests of the appellant by considering the reasons why she had strenuously objected to the application, which reasons could be gathered from the affidavits filed by the appellant.

[5] The learned Judge did not consider the effect of the misfeasance summons in his written judgment. The acts of misfeasance, breach of trust and breach of fiduciary duties allegedly committed by the respondents were in respect of the company's properties and had been properly set out in the statement of claim and showed a reasonable cause of action. This was an important issue which the learned Judge should have considered and discussed in his grounds of judgment because a stay would be refused if there was evidence of misfeasance or of irregularities which appeared to the Court to require investigation, especially so as the stay order would mean the end of the misfeasance proceedings which could only continue in the course of the winding-up.

[6] On the issue of delay, there had been a delay of 5 $^{1}/_{2}$ years between the time the order for compulsory winding-up was granted by the High Court and the filing of the notice of motion for stay and there was no explanation offered why the application was not made within a reasonable time. In the circumstances, and following the case of *Mookapillai v. Sri Saringit Sdn. Bhd.* the application for stay was made too late.

[7] It is well settled law that the discretion whether to grant or refuse an order for stay of the winding-up proceedings is vested in the learned Judge. However, where the discretion has not been exercised judicially, this Court can interfere with an order made by a Judge in the exercise of his discretion. In the present case there were ample grounds which justified interference with the learned Judge's exercise of his discretion. In particular, the pending misfeasance suit ought not to be stifled by any application for stay and in the circumstances, the respondents' notice of motion ought to have been dismissed.

[Appeal allowed with costs]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG SYARIKAT: *Prosiding Penggulungan - Hakim Perbicaraan memberikan penggantungan prosiding penggulungan di bawah s. 243 Akta Syarikat 1965 - Pelaksanaan budibicara - Rayuan terhadap keputusan - Samada Hakim perbicaraan telah tersalah-arah diri sendiri - Samada Hakim perbicaraan telah gagal menimbangkan dan memakai prinsip yang betul di bawah s. 243.*

UNDANG-UNDANG SYARIKAT: *Prosiding penggulungan - Hakim perbicaraan memberikan penggantungan prosiding penggulungan di bawah s. 243 Akta Syarikat 1965 - Lewat $5^1/_2$ tahun dalam membuat permohonan untuk penggantungan - Samada material - Samada kelewatan melampau dan satu halangan untuk memberikan penggantungan.*

Nadchatiram Realties (1960) Sdn. Bhd. (syarikat tersebut) adalah sebuah syarikat keluarga yang mana pemegang-pemegang sahamnya terdiri daripada ahli-ahli keluarga Nadchatiram. Disebabkan oleh pembayaran cukai pendapatan yang tidak dijelaskan syarikat tersebut telah digulung pada 5 September 1989. Pada 9 March 1994 responden telah memfailkan notis usul untuk mendapatkan penggantungan bagi penggulungan tersebut, permohonan untuk penggantungan itu telah disokong oleh penyelesai. Perayu telah membantah permohonan tersebut atas beberapa alasan, salah satu daripadanya adalah bahawa terdapatnya saman misfeasans terhadap responden keempat yang sedang menantikan penyelesaian. Hakim perbicaraan yang bijaksana telah membenarkan permohonan tersebut dan memberikan responden penggantungan bagi prosiding penggulungan tersebut.

Atas rayuan, perayu telah berhujah bahawa Hakim yang bijaksana, bilamana melaksanakan budibicaranya dalam memberikan satu penggantungan bagi perintah penggulungan tersebut, telah tersalah arah dirinya sendiri apabila beliau gagal untuk menimbangkan dan memakai prinsip-prinsip betul yang mempengaruhi satu penggantungan di bawah s. 243, Akta Syarikat 1965 (Akta tersebut). Perayu seterusnya berhujah bahawa daripada fakta-fakta tersebut, Hakim yang bijaksana sepatutnya mendapati bahawa responden telah melakukan kelewatan yang melampau dalam membuat permohonan tersebut, oleh kerana, sesuatu permohonan untuk satu perintah penggantungan haruslah dibuat dengan segera.

Diputuskan:

Oleh Mohamed Dzaiddin bin Hj. Abdullah HMP (menyampaikan keputusan Mahkamah):
[1] Prinsip-prinsip yang mempengaruhi pemberian satu penggantungan di bawah s. 243 Akta tersebut adalah bahawa:

1. Pemberian satu penggantungan di bawah s. 243 adalah menurut budibicara dan beban terletak pada pihak yang memohon penggantungan untuk mencapai suatu kes yang mencukupi atau memadai baginya.
2. Sikap pemiutang, penyumbang dan penyelesai adalah satu pertimbangan yang relevan.
3. Bahawa dalam melaksanakan budibicaranya, Mahkamah akan menimbangkan bukan sahaja kepentingan pemiutang tetapi juga sama ada ianya menghasilkan atau merugikan prinsip-prinsip komersial serta kepentingan awam.
4. Penggantungan akan ditolak jika terdapatnya keterangan misfeasans atau perkara-perkara luar-aturan yang menuntut penyiasatan.

[2] Walaupun penutup penghakiman bertulisnya kelihatan seolah-olah menyarankan bahawa Tuan Hakim perbicaraan telah memberikan pertimbangan yang memadai kepada penghujahan yang dibuat bagi pihak perayu, penelitian penghakiman tersebut telah

mengakibatkan kesimpulan bahawa tidak terdapat pertimbangan yang telah diberikan kepada hujahan Peguam yang membantah permohonan tersebut. Ianya kelihatan bahawa Yang Arif telah bergantung seluruhnya pada penghujahan bertulis penyelesai dan dengan itu telah membuat keputusannya atas terma-terma yang disarankan oleh penyelesai.

[3] Dalam kes semasa ini, perayu merupakan pemegang saham dan penyumbang syarikat tersebut, yang mana mempunyai kepentingan dalam syarikat tersebut setelah ianya digulung. Dalam ketiadaan apa-apa yang disebutkan, dalam penghakiman tersebut, mengenai kedua-dua afidavit yang telah difailkan oleh perayu menentang permohonan bagi menggantung penggulungan itu, Hakim yang bijaksana telah gagal menimbangkan sikap perayu yang mana adalah amat penting dalam memutuskan bagaimana budibicara Mahkamah seharusnya dilaksanakan.

[4] Ianya jelas bahawa dalam memberikan penggantungan, Hakim yang bijaksana telah menerima penghujahan penyelesai bahawa kesan penolakannya untuk memberikan penggantungan akan melucuthak pemegang-pemegang saham dari hak mereka untuk menguruskan aset-aset tersebut dengan sendirinya. Walaubagaimanapun, Mahkamah tidak seharusnya memberikan perhatian pada kepentingan responden sahaja, tetapi adalah terikat untuk memberikan perhatian pada kepentingan perayu juga dengan menimbangkan alasan mengapa beliau telah dengan kerasnya membantah permohonan tersebut, yang mana alasan-alasannya boleh didapati daripada afidavit-afidavit yang difailkan oleh perayu.

[5] Hakim yang bijaksana tidak menimbangkan kesan saman misfeasans dalam penghakiman bertulisnya. Perbuatan misfeasans, kemungkiran amanah dan kemungkiran kewajipan-kewajipan fidusiari yang dikatakan telah dilakukan oleh responden adalah berhubung dengan harta-harta syarikat dan telah dibentangkan dengan betulnya dalam pernyataan tuntutan dan menunjukkan kausa tindakan yang wajar. Ini adalah satu isu yang penting yang mana seharusnya telah dipertimbangkan dan dibincangkan oleh Tuan Hakim yang bijaksana dalam alasan-alasan penghakimannya kerana sesuatu penggantungan akan ditolak sekiranya terdapat bukti misfeasans atau luar-aturan yang mana dilihat oleh Mahkamah memerlukan penyiasatan, khususnya sedemikian kerana perintah penggantungan itu akan menamatkan prosiding-prosiding misfeasans yang mana hanya boleh diteruskan dalam proses penggulungan.

[6] Mengenai isu kelewatan, terdapat kelewatan selama $5^1/_2$ tahun antara masa perintah penggulungan wajib diberikan oleh Mahkamah Tinggi dan pemfailan notis usul untuk penggantungan dan tidak terdapat penjelasan yang diberikan mengenai mengapakah permohonan tersebut tidak dibuat dalam sesuatu tempoh masa yang wajar. Dalam keadaan yang sedemikian, dan mengikuti kes *Mookapillai lwn Sri Saringgit Sdn. Bhd.* permohonan untuk penggantungan telah dibuat terlalu lewat.

[7] Ianya adalah menurut undang-undang muktamad bahawa budibicara samada untuk memberikan atau menolak sesuatu perintah untuk penggantungan prosiding undang-undang terletakhak pada Tuan Hakim yang bijaksana. Walaubagaimanapun, di mana budibicara telah tidak dilaksanakan di sisi kehakiman, Mahkamah ini boleh mengganggu perintah yang telah dibuat oleh seorang Hakim dalam melaksanakan budibicaranya. Dalam kes semasa ini, terdapat alasan-alasan mencukupi yang mana mewajarkan gangguan terhadap pelaksanaan budibicara oleh Hakim yang bijaksana. Khususnya, guaman misfeasans yang menanti penyelesaian tidak seharusnya dihapuskan oleh mana-mana permohonan untuk penggantungan dan dalam keadaan tersebut, notis usul responden seharusnya ditolak.

[Rayuan dibenarkan dengan kos]

Cases referred to:
Krextile Holdings Pty Ltd v. Widdows [1974] VR 689 ***(foll)***
Re Calgary and Edmonton Land Co. Ltd [1975] 1 WLR 355 ***(foll)***
Re Telescriptor Syndicate Ltd [1903] 2 Ch. 174 ***(foll)***
Mookapillai v. Sri Saringgit Sdn Bhd [1981] 2 MLJ 114 ***(refd)***
Re European Assurance Society [1872] WN 85 ***(refd)***
Re Lowston Ltd [1991] BCLC 570) ***(refd)***
Re South Barrule Slate Ouarry Company [1869] LR 8 Equity 688 ***(cit)***
Re Data Homes Pt Ltd [1972] 2 NSWLR 22 ***(refd)***
Re Kie Hock Shipping [1985] 1 MLJ 411 ***(refd)***
Re B. Johnson & Co (Builders) Ltd [1955] Ch. 634 ***(refd)***
Cavendish Bentinck v. Fenn [1887] 12 App. Cas. 652 ***(refd)***
Re Etic Ltd [1928] 1 Ch. 861 ***(refd)***
Evans v Bartlam [1937] AC 473 ***(refd)***
S & F International Ltd v. Transcon Engineering Sdn Bhd [1985] 1 MLJ 62 ***(refd)***
Tien Ik Sdn Bhd v. Kuok Khoon Hwong, Peter [1992] 2 MLJ 689 SC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 243, 305
English Companies Act 1862, s. 89
English Companies Act 1948, s. 305(1), 333

Other sources referred to:
Law of Company Liquidation, McPhersons's, 3rd ed., pp. 445-446
Palmer's Company Law, 24th ed., Vol. 1, para 88-28, p. 1390

For the appellant - R.R. Sethu (Satharuban Sivasubramaniam with him); M/s. Satha & Co.
For the respondents - Saraswathy Devi Nadchatiram (Ravisothy and Mahadevi Nadchatiram with her); M/s. N. Saraswathy Devi
For the Official Receiver & Liquidator - Noorin Badaruddin, Federal Counsel

JUDGMENT

Mohamed Dzaiddin bin Hj. Abdullah FCJ:

This appeal is concerned with the exercise of discretion of the trial Judge in granting a stay of the winding-up proceedings under s. 243 of the Companies Act 1965 (the Act).

Nadchatiram Realities (1960) Sdn. Bhd. (the company) was a family company incorporated under the repealed Companies Ordinances 1940-46 on 10 November 1960. The shareholders of the company comprised members of the Nadchatiram family of Seremban, most of whom are lawyers. As a result of non-payment of income tax, a winding-up petition *vide* Seremban High Court Companies Winding-Up no. 28-2-1988 was presented by the Department of Inland Revenue on behalf of the Government of Malaysia against the company on 30 April 1988. On 5 September 1989, the Court granted the order and thereafter the company was placed under the supervision of the official receiver who was appointed as the liquidator. The company's liabilities were estimated at RM1.03 million, although the assets were worth more than RM20 million. Hence, the company was still a solvent company.

It should be noted that after the company was wound up by the Court, several actions were commenced in the Seremban High Court by family members of the company against one another pertaining to the company's assets.

One action which is relevant to this appeal is originating summons no. 24-346-92 commenced by the appellant as a contributory of the company, against the 4th respondent under s. 305 of the Act for several alleged acts of misfeasance, breaches of trust, unlawful transfers of the company's properties and misappropriation of its funds. This originating summons had since been converted into a writ action and was pending hearing.

On 9 March 1994, the 1st, 2nd, 3rd and the 4th respondents filed a notice of motion seeking the following orders:

(a) that the winding-up order made against Nadchatiram Realities (1960) Sdn. Bhd., on 5 September 1989 be discharged and/or that all proceedings in relation to the winding-up be stayed altogether;

(b) that the liquidator appointed under the said winding-up order, namely the official receiver, be released and/or discharged;

(c) that the company be allowed to carry on business pursuant to s. 243 of the Companies Act, 1965.

The application was supported by the liquidator, who in his report to the Court confirmed that the company was solvent and that the creditors could be paid in full. The appellant opposed the application on several grounds as stated in her affidavits affirmed on 16 and 18 March 1994 respectively. The learned Judge heard the application on 22 March 1994, and after hearing Counsel and considering the liquidator's written submission, his Lordship allowed the application with additional orders with regard to the convening of an EGM and the utilisation of the sum of RM1,295,800 to pay off the debts and costs of the winding-up.

In his ten-page "alasan penghakiman", where after having said so much by way of explanatory introduction and reproducing the entire liquidator's written submission, the learned Judge concluded in the following manner:

> Dalam suasana di atas dan setelah menimbangkan penghujahan yang dibuat oleh kesemua pihak saya telah memberikan perintah seperti dipohonkan (PSP) dan membenarkan permintaan Encik Lee bahawa hendaklah diadakan Mesyuarat Agung Tahunan (AGM) dalam masa dua bulan dari tarikh pendengaran ini iaitu 22 Mac 1994 untuk melantik Lembaga Pengarah untuk mengambilalih kuasa (control) syarikat tersebut dan mengambil milikan kesemua dokumen dan fail yang berada dalam tangan likuidator. Saya memerintahkan juga bahawa harga jualan harta syarikat berjumlah RM1,295,800 dibahagi-bahagikan oleh Pegawai Penerima/Likuidator termasuk bayaran semua kos caj dan perbelanjaan penggulungan.

The appellant had raised several grounds of appeal in the memorandum of appeal filed on 14 April 1994. However, the crucial ground argued before us by Counsel was that the learned Judge, when exercising his discretion in granting a stay of the winding-up order, had misdirected himself when he failed to consider and apply the correct principles governing a stay under s. 243 of the Act. The other ground, which is of no less importance, was that from the facts, the learned Judge ought to have found that the respondents had committed inordinate delay in making the application, since, on the authorities, an application for an order for stay must be made promptly.

Encik Sethu, for the appellant, in his submission referred to *McPhersons's Law of Company Liquidation*, 3rd ed. pp. 445-446 and some leading cases dealing with the principles which the Court should consider and must have regard to before granting or refusing a stay under s. 243 of the Act. Counsel was heard to complain that the learned Judge was wrong to have insisted that he would only consider local authorities in

preference to cases from other jurisdictions when deciding the application for a stay. Counsel was of the view that it was for this reason that the learned Judge fell into error because he failed to consider the principles established in the foreign cases where our provision of s. 243 is similar to the English and Australian Companies legislations. Instead, he seemed to have paid greater attention to the liquidator's report and the written submission in his "alasan penghakiman". Counsel submitted that the fact that the company was solvent and could discharge all its debts in full and that it was reasonable in the circumstances of the case to grant a stay were not sufficient grounds. The Court must be satisfied that it ought to grant a stay (*Krextile Holdings Pty Ltd v. Widdows* [1974] VR 689) and the applicant must make out a case that carries conviction (In *re Calgary and Edmonton Land Co. Ltd* [1975] 1 WLR 355 at pp 358-359). Further, it was contended that the learned Judge had misdirected himself in failing to consider the misfeasance summons brought by the appellant against the 4th respondent and on the authority of in *re Telescriptor Syndicate Ltd* [1903] 2 Ch. 174, which is a leading case on stay of winding-up proceedings, the application should have been refused. Next, on the question of delay, Counsel submitted that there had been a delay of almost six years before the notice of motion was filed on 9 March 1994. This was fatal. Counsel relied on the Federal Court decision of *Mookapillai v. Sri Saringgit Sdn Bhd* [1981] 2 MLJ 114.

In response to the above submission, Datin Saraswathy Devi argued that the respondents had complied with the requirements of s. 243 of the Act. Counsel also submitted that the learned Judge had fully dealt with all the matters in his written judgment and had considered all the relevant factors before making the orders. We would note that an interesting part of Counsel's submission was on the question of a partial stay. She argued that s. 243 seemed to allow a partial stay because of the words "on such terms and conditions" as appearing in sub-section (1) of s. 243. Counsel was, however, unable to furnish us with any authority to support her proposition that a partial stay of the winding-up order was possible. On the other hand, Encik Sethu, in reply relied on in *re European Assurance Society* [1872] WN 85, which held that the Court had no power to stay part of the proceedings. In that case, there was a motion for an order that all proceedings, in relation to the winding-up of the European society might be stayed until the further order of the Court and in particular that the official liquidators of the society might be restrained from taking, prosecuting or proceeding with any action, suit or other proceedings relating to the winding-up of the society. The Solicitor General, for the official liquidators, contended that the Court had no power under the 98th section of the Companies Act 1862 to make any order for a partial stay of proceedings in a winding-up. The Vice Chancellor agreed and held that he had no jurisdiction under the section except to stay all proceedings in the winding-up.

In the circumstances, we agreed with Encik Sethu that the Court had no jurisdiction to grant a partial stay of the winding-up proceedings.

Lastly, on the misfeasance proceedings, Datin Devi submitted that the appellant's claims in the said action were groundless.

After hearing Counsel, we allowed the appeal and now give our reasons.

Section 243 states:

> (1) At any time after an order for winding-up has been made the Court may, on the application of the liquidator or, of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed,

make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

(2) On any such application the Court may, before making an order, require the liquidator to furnish a report with respect to any facts or matters which are in his opinion relevant.

It is clear from sub-section (1) that the Court has a discretion, on the application of the liquidator or official receiver, or any creditor or contributory to stay the proceedings under a winding-up order. But, before granting a stay, the section requires on proof to the satisfaction of the Court that it ought to grant a stay. This means that the Court has to be satisfied that it is right to stay the winding-up proceeding and if there be matters as to which the Court has doubts, it should not grant a stay (*Re Lowston Ltd* [1991] BCLC 570).

The principles which governed the Court in the exercise of its jurisdiction whether to grant or refuse a stay have been established in the following cases. In the leading case of *Re Telescriptor Syndicate Ltd*, Buckley J was dealing with an application under s. 89 of the English Companies Act 1862, which is similar to our s. 243, which provided that the Court may at any time after a winding-up order, upon the application of any creditors or contributory and "upon proof to the satisfaction of the Court that all proceedings in relation to such winding-up ought to be stayed", make an order staying the same. What then should be the material considerations to induce the Court to order a stay? According to Buckley J (taken from the headnote which summarised the text of his decision) at p. 174:

In the exercise of its jurisdiction with reference to staying proceedings under an order for the winding-up of a company, the Court should, so far as possible, act upon the principles which are applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual in which cases the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large.

In refusing or postponing a stay of winding-up proceedings the Court will have regard to the following facts:

(a) That directors have not complied with their statutory duties as to giving information to the official receiver or furnishing a statement as to the affairs of the company.

(b) That there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully paid shares forming the consideration for the purchase of property by the company on its formation.

(c) That the promoter has made gifts of fully paid shares to the directors.

(d) That there are any other matters connected with the promotion, formation, or failure of the company, or the conduct of its business or affairs, which appear to the Court to require investigation.

We pause here to state that we respectfully accept the above principles laid down by Buckley J and would apply them in dealing with the present appeal.

In *Krextile Holding Pty. Ltd. v. Widdows, supra*? Gillard J of the Supreme Court of Victoria held at p. 694:

> It is not merely necessary for the applicant to establish that a stay is reasonable in the circumstances. He must satisfy the Court it ought to grant a stay. As was emphasized by Buckley J, in *Re Telescriptor Syndicate Ltd. supra*, at p. 182: 'I decline to order a stay of these proceedings until it is proved to my satisfaction that the winding-up ought to be stayed. That will not be proved to my satisfaction until it is shown to me that all the facts are as I hope they are - that the trading operations of this company have been fair and above-board.'

The above principles have been summarised by the learned editors of *Palmer's Company Law* 24th ed. Volume 1 para 88-28, p. 1390 as follows:

> In exercising this discretion the Court will be guided by the analogy of the former practice in bankruptcy in rescinding a receiving order that is to say, it will consider the interests of commercial morality and not merely the wishes of creditors, and will refuse a stay if there is evidence of misfeasance or of irregularities demanding investigation.

In *re Calgary & Edmonton Land Co. Ltd., supra*, it was held that the jurisdiction of the Court was discretionary and that it was for those who sought a stay to make out a sufficient case. Megarry J also dealt with the persons whose interests the Court had to consider on an application for a stay. (At p. 360, his Lordship stated):

> These must, of course, depend on the circumstances of each case; but where, as here, there is a strong probability, if not more, that the assets of the company will suffice to pay all the creditors and the expenses of the liquidation, and so leave a surplus for the members of the company, there are plainly three categories to consider. First, there are the creditors... Second, there is the liquidator... Third, there are the members of the company. No question of satisfying them by immediate payment of all that they are entitled to can very well arise; for unlike the creditors, with their ascertained or ascertainable debts, the rights of the members cannot be quantified until the liquidation is complete. Accordingly, in normal circumstances I think that no stay should be granted unless each member either consents to it, or is otherwise bound not to object to it, or else there is secured to him the right to receive all that he would have received had the winding-up proceeded to its conclusion. Each member has a right of a proprietary nature to share in the surplus assets, and each should be protected against the destruction of that right without good cause.
>
> It will be observed that each of the heads is qualified by the words "in normal circumstances". I am not suggesting that in these cases there are hard and fast rules; but I am saying that the circumstances that I have mentioned will usually be at least highly material in deciding how the Court's discretion should be exercised.

In summary, the principles which emerge from the above authorities are these:

1. The granting of a stay under s. 243 of the Act is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.
2. The attitude of the creditors, contributories and the liquidator is a relevant consideration.
3. That in exercising its discretion, the Court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.
4. Last, and which by no means least, is that stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.

It must, however, be remembered that the above considerations are not meant to be exhaustive, but they have been summarised to indicate that they had not been considered or discussed in the written judgment of the learned Judge.

Therefore, based on the foregoing principles, we were satisfied that in the instant case, the learned Judge had completely misdirected himself on the principles governing an application for stay under s. 243 of the Act. First, it would be observed from his Lordship's ten-page "alasan penghakiman" that a considerable part of the judgment was spent in reproducing the written submission of the liquidator.

The words "setelah menimbangkan penghujahan yang dibuat oleh kesemua pihak" in the concluding part of his written judgment seemed to suggest that he had given sufficient consideration to the submissions made on behalf of the appellant. Yet, upon reading the judgment, we could only come to the conclusion that no consideration was given to the Counsel's arguments opposing the application. On the other hand, it would appear to us that his Lordship relied entirely on the liquidator's written submission, wherein the judgment of Sir W.M. James, VC, in In *re South Barrule Slate Ouarry Company* [1869] LR 8 Equity 688, was relied on and thus made his finding on the terms recommended by the liquidator. In this regard, Counsel for the appellant submitted that the liquidator seemed to have sided the respondent because apart from recommending that this was a proper case for the grant of stay, he failed to bring to the attention of the Court "the ugly side" of the company's affairs which he had referred to in his report. Furthermore, the report made no reference to the adverse effect of the stay on the appellant. According to Counsel, the duty of the liquidator was to act impartially and to draw the attention of the Court to facts and matters which were material for the Court's consideration. We would agree with the above proposition. In *Gooch's* case [1871] 7 Cts. App 207 at 211, it was stated that:

> (O)f the most importance that the liquidator should.... maintain an even and impartial hand between all individuals whose interests are included in the winding up. He should have no leaning for or against any individual whatever.

Secondly, the attitude of the creditors, contributories and the liquidator is a relevant consideration (In *re Calgary & Edmonton Land Co Ltd*). In the instant case, the appellant is a shareholder and a contributory of the company, who has the following interests in the company upon its winding-up. Firstly, a right of a proprietary nature to share in the surplus assets. Secondly, by consent of the liquidator, she was granted the right to use the name of the company to prosecute or defend any action that would be brought by or against the company. Thirdly, as a contributory, she acquired a right given by s. 305 of the Act to file misfeasance action against the 4th respondent. From the "alasan penghakiman" and in the absence of any mention regarding the two affidavits, we were satisfied that the learned Judge failed to consider the attitude of the appellant which was, in the words of Megarry J in *Re Calgary & Edmonton Land Co. Ltd* (*supra*), "at least highly material in deciding how the Court's discretion should be exercised." No doubt based on the liquidator's report and submission, the company was solvent with an asset worth more than RM20 million and that this was not a company involving the public and that the official receiver supported the application for stay to enable the contributories, who are brothers and sisters in the same family to sort out their differences within the company. Therefore, it was quite obvious to us that in granting the stay, the learned Judge accepted the liquidator's submission that the effect of his refusal to grant a stay would mean that the liquidator would proceed to wind up the affairs of the company by realising the assets, paying dividend to the creditors and then making a return for the surplus assets to the contributories. This, according to the liquidator, would deprive the rights of the shareholders to deal with the assets themselves. But, the Court should not only look at the interest of the respondents, but was bound to look at the interest of the appellant by

considering the reasons why she had strenuously objected to the application which could be gathered from the affidavits.

Thirdly, we found that the learned Judge did not consider the effect of the misfeasance summons in his written judgment. The acts of misfeasance, breach of trust and breach of fiduciary duties allegedly committed by the respondents were in respect of the company's properties where charges were created against these properties for the benefit of the respondents. There were also allegations of unlawful and unauthorised transfers of the various pieces of land to the respective respondents and non-accounting of the proceeds of acquisition awards, income derived from the company's remaining properties, etc. We were satisfied, after examining the pleadings, that the particulars of the alleged acts of misfeasance and breaches of trust and duty had been properly set out in the statement of claim and showed a reasonable cause of action. In our view, this was an important issue which the learned Judge should have considered and discussed in his written grounds of judgment because under Buckley J's principles a stay would be refused if there was evidence of misfeasance or of irregularities which appeared to the Court to require investigation. Moreover, the effect of the stay order would mean the end of the misfeasance proceedings because it could only continue in the course of the winding-up.

There again, where it would be shown that there had been misconduct in the affairs of the company which required investigation, it would be detrimental to commercial morality to have stayed the winding-up, thereby preventing an investigation from taking place. In *re Data Homes Pt Ltd* [1972] 2 NSWLR 22, Mason JA, delivering the judgment of the Court of Appeal discussed what is meant by the expression "detrimental to commercial morality" (at p. 26) as follows:

> It has been held here and in the Supreme Court of Victoria that, in considering an application under s. 243 of the Companies Act, the Court should have regard, not merely to the interests of creditors, but also to the public interest, including the question whether the granting of a stay would be detrimental to commercial morality: *Re Denistone Real Estate Pty. Ltd. and the Companies Act* [1970] 3 NSWR 327; *Re Mascot Home Furnishers Pty Ltd* [1970] VR 593. This principle accords with the principle that has been applied to rescission or annulment of a bankruptcy. Buckley J expressed it in these terms in *Re Telescriptor Syndicate Ltd* [1903] 2 Ch. 174, at pp 180-181: "Where application is made in bankruptcy to rescind a receiving order or to annul an adjudication, the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case. In *re Hester* [1889] 22 QBD 632, at p. 641 some trenchant observations of Fry LJ will be found on the idle notion that the Court is bound by the consents of the creditors. The Court has to exercise a discretion. It is bound to regard not merely the interests of the creditors. It has a duty with regard to the commercial morality of the country: see In *re Hester* [1889] 22 QBD 632; In *re Flatau* [1893] 2 Q.B. 219; In *re Taylor* [1901] 1 K.B. 744.
>
> That case provides an illustration of what is meant by the expression "detrimental to commercial morality ...
>
> But it should not be assumed that there is any sharp dividing line between considerations which are detrimental to commercial morality and those which are opposed to the public interest. They clearly overlap. Nor should it be assumed, as the appellant would have it, that each is a narrow concept for in truth they are designed to give expression to the very broad discretion which s. 243 confers upon the Court.

> There is as little reason for confining considerations of commercial morality to the investigation of misconduct in the affairs of the company as there is for restricting the public interest to the pecuniary interests of existing and future creditors.

With respect to the misfeasance proceedings under s. 305 of the Act, Encik Sethu submitted the proceedings could only continue in the course of winding-up. It could not proceed independently. Counsel submitted that under the section, the Court had summary jurisdiction over the directors or officers of the company for the misconduct. The relevant part of s. 305(1) states as follows.

> (1) If in the course of winding-up it appears that any ... officer has ... been guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may on the application of the liquidator or of any creditor or contributory examine into the conduct of that ... officer and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the ... misfeasance or breach of trust or duty as the Court thinks just.

It would be correct to say that our s. 305(1) is based on s. 333 of the English Companies Act 1948, but the words "or duty" were taken from s. 305 of the Companies Act 1961 of the State of Victoria (In *re Kie Hock Shipping* [1985] 1 MLJ 411). However, it is settled law that s. 333 of the English Act did not create any new or distinct rights but only provided summary remedy. In *re B. Johnson & Co (Builders) Ltd* [1955] Ch. 634, 648, Evershed MR observed that s. 333 was merely a procedural section and did not establish a new tort. In *Cavendish Bentinck v. Fenn* [1887] 12 App. Cas. 652 at p. 669, Lord Macnaghten said:

> Section 165 of the Act of 1862 [the misfeasance section, now s. 333 of the Act of 1948] has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient, remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company.

In *re Etic Ltd* [1928] 1 Ch. 861, 875, Maugham J stated that the section "is not applicable to all cases in which the company has a right of action against an officer of the company. It is limited to cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company. Breach of duty of course would include a misfeasance or a breach of trust in the stricter sense, and the section will apply to a true case of misapplication of money or property of the company, or a case where there has been retention of money or property which the officer was bound to have paid or returned to the company."

From the pleadings, we were satisfied that the appellant in bringing her claim under s. 305 of the Act was merely seeking a summary remedy in the course of the winding-up of the company and that her claim was within the scope of the section.

On the issue of delay, based on the facts, we were satisfied that there had been a delay of $5^{1}/_{2}$ years between the time the order for compulsory winding-up was granted by the Seremban High Court (30 September 1988) and the filing of the notice of motion for stay (9 March 1994). There seemed to be no explanation offered why the application was not made within a reasonable time. Abdoolcader J (as he then was), in delivering the judgment of the Federal Court in (*supra*), agreed with the trial Judge who dismissed the

appellant's summons as having been made rather late, which was some $1^{1}/_{2}$ years after the company was ordered to be wound up and after previous applications for stay were refused. The Federal Court cited with approval the observation of Megarry J in In *re Calgary & Edmonton Land Co. Ltd* (*supra*) at p. 358-9:

> (T)hat the applicant for a stay must make out a case that carries conviction. It may be that where the liquidation has been proceeding for only a short while the Court ought to be more ready to grant a stay than in cases where the liquidation has been proceeding for a considerable time and much has been done on the faith of it.

Finally, it is a well settled law that the discretion whether to grant or refuse an order for stay of the winding-up proceedings is vested in the learned Judge. Our function here is initially one of review only. However, where the discretion has not been exercised judicially, we can interfere with an order made by a Judge in the exercise of his discretion, e.g. when he has committed an error of law or misconceived the facts or that he has not given sufficient weight to relevant considerations or that the decision would result in injustice being done: *Evans v Bartlam* [1937] AC 473; *S & F International Ltd v. Transcon Engineering Sdn Bhd* [1985] 1 MLJ 62, 64 FC; *Tien Ik Sdn Bhd v. Kuok Khoon Hwong, Peter* [1992] 2 MLJ 689 SC.

Applying the above principles to the facts and circumstances of the instant case, we were satisfied that the learned Judge had not exercised his discretion judicially under s. 243 of the Companies Act. There were ample grounds which justified us to interfere with the learned Judge's exercise of his discretion and in particular the pending misfeasance suit ought not to be stifled by any application for stay and, accordingly, the respondents' notice of motion ought to have been dismissed. In the result, we allowed the appeal with costs here and below, and the orders of the learned Judge were accordingly set aside. Deposit to be refunded to the appellant. At the request of both parties, we also ordered the misfeasance suit to be set down for an early trial.

With respect to rayuan sivil no. 02-344 of 1994 involving the same parties before us, in the light of the above decision, the appeal was accordingly dismissed with costs here and below. We ordered the deposit be paid to the respondents on account of taxed costs.